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# Public Prosecutor v Mohd Noor bin Jaafar

HIGH COURT (MELAKA) — CRIMINAL REVIEW NO MT1–43–2 OF 2004
LOW HOP BING J
5 AUGUST 2005

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*Constitutional Law — Courts — Jurisdiction — Whether offence under s 5(1) of the Islamic Religious Schools (Malacca) Enactment 2002 belong to category of offences against precepts of Islam — Whether subject matter excluded from jurisdiction of Syariah courts — Control of Islamic Religious Schools (Malacca) Enactment 2002 s 5(1) — Federal Constitution art 121(1) & (1A)*

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*Constitutional Law — Legislature — State Enactment — Validity of state enactment — Control of Islamic Religious Schools (Malacca) Enactment 2002 ss 33 & 34*

*Constitutional Law — Public Prosecutor — Extent of power — Extent of power over authorisation of Syariah Officer of Islamic Religious Department Malacca to prosecute in a magistrate's court — Criminal Procedure Code ss 376(iii) & 377(b)*

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The accused was charged in the state of Malacca for maintaining a religious school which was not registered pursuant to s 5(1) of the Control of Islamic Religious Schools (Malacca) Enactment 2002 ('the Enactment'). In the course of proceedings in the magistrate's court Malacca, the learned magistrate had

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stayed the proceedings under s 30 of the Courts of Judicature Act 1964 and referred some questions which arose as to the effect of some provisions of the Federal Constitution ('Constitution'). The parties agreed that these questions were: (1) whether the letter of authorisation or consent issued by a deputy public prosecutor ('DPP') pursuant to ss 376(iii) and 377(b) of the Criminal

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Procedure Code ('CPC') authorising a Syariah officer (Syarie Prosecutor) of the Islamic Religious Department Malacca to prosecute in a magistrate's court, was constitutional; and (2) whether ss 33 and 34 of the Enactment which confered jurisdiction upon a first class magistrate to try an offence under the Enactment were constitutional.

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**Held**:

(1) The factual background showed that the letter of authorisation or consent was given by the learned DPP to a Syariah officer (Syarie Prosecutor) to conduct prosecution in the magistrate's court and sessions court in

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Malacca. The officer was from the Islamic Religious Department which was a Government department as envisaged in s 377(b)(3) of the CPC, and the conduct of prosecution in relation to the charge was also subject to the control and direction of the Public Prosecutor ('PP') (see para 17). Pursuant to an amendment vide Enactment No 8 of 2003, the

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word 'Director' in s 34(1) and (2) of the Enactment had been substituted with the words 'Public Prosecutor' so that the PP's power to give consent or authorisation to prosecute is vested in the PP in consonance with

art145(3) of the Constitution, and the expression 'PP' would include a DPP (see para 18).

(2) The general words 'rights and powers' appearing in s 376(iii) of the CPC had been construed in *Abdul Hamid v PP* [1956] MLJ 231 that consent need not be given personally by the PP but a DPP was permitted to do so. The letter of authorisation or consent to authorise the officer from the Islamic Religious Department to conduct the prosecution in the magistrate's court was valid and constitutional (see para 19).

(3) Section 33 expressly provided that a magistrate should have jurisdiction to try any offence under the Enactment. The vesting of this jurisdiction in the magistrate's court was consistent with federal law provided under s 85 of the Subordinate Courts Act 1948 (see para 33). As the jurisdiction to try the offence as alleged in the charge herein had been expressly conferred upon a magistrate, it meant that it was not a matter in which a Syariah court enjoys exclusive jurisdiction, and so there could be no contravention of art 121(1A) of the Constitution under which a civil court ceased to have jurisdiction if and only if a particular matter comes within the jurisdiction of the Syariah court (see para 34).

(4) The nature of the offence under s 5(1) of the Enactment did not belong to the category of offences against the precepts of the religion of Islam and so it was clearly not within the exclusive jurisdiction of the Syariah courts (see para 38); *The Islamic Council of Penang & Butterworth v Shaik Zolkaffily* [2003] 4 AMR 501 followed.

(5) Since the subject matter concerned the registration of an Islamic religious school and not the precepts of the religion of Islam, there could be no doubt that the Malacca State Legislature had clearly intended to exclude the subject matter from the jurisdiction of the Syariah courts and instead conferred the jurisdiction on a magistrate. In other words, it was not a matter within the jurisdiction of the Syariah courts. Sections 33 and 34 of the Enactment, when tested against art 121(1) and (1A) of the Constitution were valid and constitutional (see para 41).

[**Bahasa Malaysia summary**

Tertuduh telah didakwa dalam negeri Melaka kerana mengadakan sekolah agama yang tidak didaftarkan mengikut s 5(1) Enakmen Pengawalan Sekolah-sekolah Agama (Melaka) 2002 ('Enakmen tersebut'). Semasa prosiding dimahkamah majistret Melaka, majistret telah menggantung prosiding dibawah s 30 Akta Mahkamah Kehakiman 1964 dan telah merujuk beberapa soalan yang telah berbangkit berkenaan beberapa peruntukan dalam Perlembagaan Persekutuan ('Perlembagaan'). Pihak-pihak telah bersetuju bahawa soalan-soalannya adalah: (1) sama ada surat pemberikuasaan atau kebenaran yang dikeluarkan oleh timbalan pendakwaraya ('DPP') yang memberikuasa kepada

pegawai Syariah (Pendakwa Syariah) dari Jabatan Agama Islam Melaka untuk mendakwa dalam mahkamah majistret, adalah mengikut perlembagaan; (2) sama ada ss 33 dan 34 Enakmen tersebut yang memberi bidangkuasa kepada majistret kelas pertama untuk membicarakan kesalahan tersebut adalah mengikut perlembagaan.

**Diputuskan**:

(1) Fakta latarbelakang menunjukkan bahawa surat pemberikuasaan atau kebenaran tersebut telah diberikan kepada DPP yang arif jepada pegawai Syariah (Pendakwa Syarie) untuk melakukan pendakwaan dalam mahkamah majistret dan mahkamah sesyen di Melaka. Pegawai tersebut adalah daripada Jabatan Agama Islam iaitu jabatan Kerajaan seperti yang dinyatakan dalam s 337(b)(3) Kanun Acara Jenayah, dan kelakuan pendakwaan yang berkenaan dengan dakwaan tersebut juga tertakluk kepada kawalan dan arahan Pendakwaraya ('PP') (lihat perenggan 17). Menurut satu pindaan, Enakmen No 8 tahun 2003, perkataan 'Director' dalam s 34(1) dan (2) Enakmen tersebut telah digantikan dengan perkataan 'Public Prosecutor' supaya kuasa PP untuk memberi kebenaran atau berikuasa untuk mendakwa terletak kepada PP bersesuaian dengan art145(3) Perlembagaan, dan ungkapan 'PP' adalah termasuk DPP (lihat perenggan 18).

(2) Perkataan-perkataan umum 'rights and powers' yang tertera dalam s376(iii) KAJ telah ditafsirkan dalam *Abdul Hamid v PP* [1956] MLJ 231 sebagai kebenaran tidak perlu diberikan secara peribadi oleh PP tetapi DPP juga dibenarkan untuk berbuat demikian. Surat pemberikuasaan atau kebenaran yang memberikuasa kepada pegawai daripada Jabatan Agama Islam untuk melakukan pendakwaan dalam mahkamah majistret adalah sah dan menurut perlembagaan (lihat perenggan 19).

(3) Seksyen 33 secara nyata memperuntukkan majistret bidangkuasa untuk mengadii sebarang kesalahan di bawah Enakmen tersebut. Letakhak bidangkuasa ini kepada mahkamah majistret adalah selaras dengan undang-undang persekutuan yang diperuntukkan di bawah s 85 Akta Mahkamah Rendah 1948 (lihat perenggan 33). Memandangkan bidangkuasa untuk mengadili kesalahan seperti yang dinyatakan dalam dakwaan di sini telah secara nyata diberikan kepada majistret, ini bermakna perkara ini bukanlah satu perkara yang mana mahkamah Syariah mempunyai bidangkuasa ekslusif, oleh itu tidak terdapat sebrang perlanggaran art121(1A) Perlembagaan yang menyatakan bahawa mahkamah sivil tidak mempunyai bidangkuasa sekiranya dan hanya sekiranya sesuatu perkara itu termasuk dalam bidangkuasa mahkamah Syariah (lihat perenggan 34).

(4) Sifat kesalahan di bawah s 5(1) Enakmen tersebut tidak tergolong dalam kategori kesalahan-kesalahan terhadap ajaran agama Islam dan oleh itu

secara jelasnya ia bukanlah dalam bidangkuasa ekslusif mahkamah Syariah (lihat perenggan 38); *The Islamic Council of Penang & Butterworth v Shaik Zolkaffily* [2003] 4 AMR 501 diikut.

(5) Memandangkan perkara subjek adalah berkenaan dengan sebuah sekolah agama Islam dan bukanlah ajaran agama Islam, tiada keraguan bahawa badan perundangan negeri Melaka telah secara jelas berniat untuk tidak memasukkan perkara subjek tersebut dalam bidangkuasa mahkamah Syariah, tetapi sebaliknya memberikan bidangkuasa kepada majistret. Dalam kata lain, ia bukanlah satu perkara yang berada dalam bidangkuasa mahkamah Syariah. Seksyen 33 dan 34 Enakmen tersebut, apabila diuji dengan art 121(1) dan (1A) Perlembagaan adalah sah dan mengikut perlembagaan (lihat perenggan 41).

**Notes**

For a case on Public Prosecutor generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1989.

For cases on jurisdiction of courts, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1684–1692.

For cases on legislature generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1933–1969.

**Cases referred to**

*Abdul Hamid v PP* [1956] 22 MLJ 231 (folld)

*Ang Theam Choom v PP* [2002] 4 MLJ 401 (refd)

*Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (refd)

*Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors* [2005] 4 MLJ 506 (refd)

*Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (refd)

*Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617 (refd)

*Islamic Council of Penang & Butterworth, The v Shaik Zolkaffily* [2003] 4 AMR 501 (folld)

*Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 (refd)

*Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] I MLJ 681 (refd)

*Minister of Home Affairs v Fisher* [1979] 3 All ER 21 (refd)

*Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 (refd)

*Pai San & Ors v Pendakwa Raya* [2002] 4 MLJ 538 (refd)

*Soon Singh a/l Bihar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (refd)

*Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266 (refd)

**Legislation referred to**

Administration of the Religion of Islam (State of Malacca) Enactment 2002 s66(2)
Control of Islamic Religious Schools (Malacca) Enactment 2002 ss 33, 34, (1), (2)
Courts of Judicature Act 1964 ss 30, (1), (2), 84(3)
Criminal Procedure Code ss 68(ii), 376(i), (iii), (iv), 377(b), (3)
Federal Constitution arts 74(1), 121, (1), (1A), 145(3)
Interpretation Acts 1948 and 1967 s 3
Penal Code ss 298A, 392, 457
Subordinate Courts Act 1948 s 85
Syariah Courts (Criminal Jurisdiction) Act 1965 s 2
Syariah Criminal Offences (Federal Territories) Act 1997

*Abdul Rashid Hj Daud (state legal advisor).*
*Mohamad Hanipa (Hj Muhamad Hj Burok, Abdullah Abd Karim, Khairuddin Othman and Firdaus Zakaria with him) (Muhamad & Co) for the accused.*

**Low Hop Bing J**:

I REFERENCE

**[1]** In the course of proceedings in the magistrate's court Malacca, the learned magistrate has stayed the proceedings under s 30 of the Courts of Judicature Act 1964 ('the CJA 1964') and referred some questions which arose as to the effect of some provisions of the Federal Constitution. The parties herein have agreed that these questions are:

(1) Whether the letter of authorisation or consent dated 27 September 2004, issued by a deputy public prosecutor pursuant to ss376(iii) and 377(b) of the Criminal Procedure Code authorising a syariah officer (Syarie Prosecutor) of the Islamic Religious Department Malacca to prosecute in a magistrate's court, is constitutional? (Question 1); and

(2) Whether ss 33 and 34 of the Control of Islamic Religious Schools (Malacca) Enactment 2002 ('the Enactment') which confer jurisdiction upon a first class magistrate ('magistrate') to try an offence under that Enactment are constitutional? (Question 2).

II FACTUAL BACKGROUND

**[2]** On 28 September 2004, one Mohd Noor bin Jaafar was charged in the magistrate's court as follows:

Bahawa kamu pada 6 Februari 2004, jam lebih kurang 10.45pg bertempat di No 7, Jalan Takh 1, Ayer Keroh Heights dalam Daerah Melaka Tengah dalam negeri Melaka telah menyenggarakan sekolah agama iaitu Tadika Pasti Al-Kauthar yang

tidak didaftarkan menurut s 5(1) Enakmen Pengawalan Sekolah-Sekolah Agama Islam (Melaka) 2002 dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 5(3) Enakmen yang sama.

(My translation:

That you on 6 February 2004, at about 10.45am at No 7, Jalan Takh 1, Ayer Keroh Heights in the district of Malacca Tengah in the state of Malacca did maintain a religious school to wit Tadika Pasti Al-Kauthar which was not registered pursuant to s 5(1) of the Control of Islamic Religious Schools (Malacca) Enactment 2002 and that you have thereby committed an offence punishable under s 5(3) of the same Enactment.) ('the charge').

**[3]** On 27 September 2004, pursuant to a certificate issued under s 376(iii) and s 377(b) of the Criminal Procedure Code ('CPC'), learned deputy public prosecutor ('DPP') En Abdul Rashid bin Hj Daud has given his authorisation or consent to En Mohd Saifuddin bin Othman, syariah officer (Syarie Prosecutor) to conduct the prosecution against the said Mohd Nor bin Jaafar in relation to the charge in the magistrate's court.

## III PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

**[4]** As the questions herein involve issues of validity and constitutionality of the aforesaid written laws which are to be tested against arts 145(3) and 121 of the Federal Constitution, it is appropriate for me to refer to the relevant principles of constitutional interpretation.

**[5]** In *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah CJ (now HRH the Sultan of Perak), speaking in a panel of five judges of the Federal Court at p 32, concisely set out the principles of interpreting a constitution in the following words:

in interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. A constitution is *suis generis* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *AG of St Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 at p 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution.

**[6]** These principles were applied by Mohd Azmi FC (as he then was) in *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 1 MLJ 617 (SC); and also by me in *Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors* [2005] 4 MLJ 506.

**[7]** In *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266, the Court of Appeal through the judgment of Gopal Sri Ram JCA further expounded the following principles:

> Generally speaking, the rules of construction that guide a court in the interpretation of ordinary statutes apply with equal force when interpreting the Federal Constitution. But there are important differences. For, the Federal Constitution, unlike any ordinary statute, does not merely declare the law. It creates and regulates the law-making power of the federation. It also creates and defines the various branches of government. It confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers. Oras Lord Diplock put it in Attorney-General of *The Gambia v Momodou Jobe* [1984] AC 689 at p 700 :
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> > A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.
>
> A court, while rendering a broad and liberal construction to the language employed by the Federal Constitution, is not entitled 'to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors'. (Per Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1.) This general rule is, however, subject to an important qualification. Where the language of the constitution is open to two constructions, a court should adopt the construction 'which will ensure the smooth and harmonious working of the constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory'. (Per Shelat and Grover JJ in *Kesavananda Bharati v The State of Kerala* AIR 1973 SC 1461 at p 1581.) Thus, a court, for the purpose of rendering a harmonious interpretation, is entitled to make implications into the language of the constitution. An implication here refers to something that 'explains, perhaps limits, the effect of what is expressed'. (Per Windeyer J in *Victoria v Commonwealth* (1971) 122 CLR 363 at p 401.)

IV QUESTION 1

**[8]** Learned DPP En Abdul Rashid bin Hj Daud submitted that under ss377(b) and s 376(i) and (iii) of the CPC read with art 145(3) of the Federal Constitution and s 3 of the Interpretation Acts 1948 and 1967, a DPP is empowered to authorise or give consent to an officer of a government department to prosecute a person charged with an offence under the Enactment. *Abdul Hamid v Public Prosecutor* [1956] 22 MLJ 231; *Ang Theam Choom v Public Prosecutor* [2002] 4 MLJ 401; and *Pai San & Ors v Pendakwa Raya* [2002] 4 MLJ 538 were cited in support.

**[9]** A reference to an article hereinafter is a reference to that article in the Federal Constitution unless the context otherwise requires.

**[10]** Learned counsel En Mohamed Hanipa, Hj Muhamad bin Hj Burok, En Abdullah bin Abd Karim, En Khairuddin bin Othman and En Firdaus bin Zakaria contended for the accused that under art. 145(3), the Attorney General has no power to institute, conduct or discontinue any proceedings for an offence in any Syariah court, and that in the State of Malacca, by virtue of s 66(2) of the Administration of the Religion of Islam (State of Malacca) Enactment 2002, the power to institute, conduct or discontinue any proceedings for an offence before a Syariah court is vested in the Chief Syariah Prosecutor who has general control and direction over all Syarie prosecutors in the state.

**[11]** They added that s 377(b) of the CPC excluded a Syarie prosecutor who is only authorised to appear in the Syariah court, and that the PP may only authorise an officer to conduct criminal prosecution in the magistrate's court if that officer has at the outset the *locus standi* to appear thereat.

**[12]** In my judgment, the importance of s 376(i), (iii) and (iv) and 377(b) of the CPC as amended vide Act A1015 would, where relevant, merit reproduction as follows:

376 Public Prosecutor

(i) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

(ii) …

(iii) The Public Prosecutor … may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exerciaable by the Public Prosecutor .... by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor … personally…

(iiiA) …

(iv) The rights and powers vested in or exerciaable by the Public Prosecutor .... by sub-s (iii) and s 68(ii) shall be exercisable by the Public Prosecutor personally'

377 Conduct of prosecutions in court

Every criminal prosecution before any court shall, subject to the following sections, be conducted:

(a) …

(b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:

(1) …;

(2) …;

(3) an officer of any Government department;

(4) …;

(5) …;

6) ….

**[13]** Further, art. 145(3) reads

143 Attorney General

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

**[14]** From the foregoing provisions of s 376 and art 145(3), it is clear that the Public Prosecutor ('PP'), or interchangeably the Attorney General, shall have control and direction, institution and discontinuance of all criminal prosecutions and proceedings under the CPC, and in the discharge of such duties and powers, the PP may appoint any fit and proper person to be a DPP.

**[15]** For the purposes of conducting a criminal prosecution before any court under the CPC, the PP personally where the rights and powers are vested in or exercisable by the PP personally, under s 68(ii) or s 376(iii), or a DPP in any other case, may authorise in writing an officer of any Government department to do so, but that does not include a criminal prosecution in eg a Syariah court: art 145(3).

**[16]** Except in the cases in which the rights and powers must be exercised by the PP personally, in relation to the exercise of all or any of the powers vested in or exercisable by the PP under the CPC or any other written law, it is pertinent to note that s 3 of the Interpretation Acts 1948 and 1967 provides that the expression 'Public Prosecutor' means the Attorney General, and includes (within the scope of his authority) a DPP appointed under any written law relating to criminal procedure and also a person authorised by any such law to act as or exercise all or any of the powers of, the PP or a DPP.

**[17]** The factual background herein shows that the letter of authorisation or consent was given by the learned DPP to En Mohd Saifuddin bin Othman as a Syariah officer (Syarie Prosecutor) to conduct prosecution in the magistrate's

court and sessions court in Malacca. The officer is from the Islamic Religious Department which is undoubtedly a Government department as envisaged in s 377(b)(3) of the CPC, and the conduct of prosecution in relation to the charge is also subject to the control and direction of the PP.

**[18]** Pursuant to an amendment vide Enactment No 8 of 2003, the word 'Director' in s 34(1)and (2) of the Enactment has been substituted with the words 'Public Prosecutor' so that the PP's power to give consent or authorisation to prosecute is vested in the PP in consonance with art. 145(3), and the expression 'PP' as alluded to above would include a DPP.

**[19]** The general words 'rights and powers' appearing in s 376(iii) of the CPC have been construed in *Abdul Hamid v PP* by Smith J. who at p 232, left column, opined that consent need not be given personally by the PP but a DPP is permitted to do so. This view is further fortified in *Pai San & Ors v PP* where Abdul Hamid JCA (now FCJ) in delivering judgment of the Court of Appeal held, *inter alia*, that the consent to prosecute given by a DPP to a fishery officer to prosecute is valid and constitutional.

**[20]** In the instant case, I am of the view that the letter of authorisation or consent to authorise the officer from the Islamic Religious Department to conduct the prosecution in the magistrate's court is valid and constitutional.

**[21]** Hence, I hold that the answer to Question 1 is in the affirmative.

V QUESTION 2

**[22]** The prosecution takes the view that:

(1) Sections 33 and 34 of the Enactment are *intra vires* art 121(1A), as evident from art 121(1) and (1A) read with para 1 in the State List, Ninth Schedule to the Federal Constitution ('the State List');

(2) under art 121(1) and (1A), the jurisdiction and powers of the courts are those conferred by or under federal law, except any matter within the jurisdiction of the Syariah courts; and

(3) the criminal jurisdiction of the Syariah courts as conferred by federal law is to be found in s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 ('the 1965 Act') which should be construed by applying the 'subject matter approach', citing *The Islamic Council of Penang & Butterworth v Shaik Zolkaffily* [2003] 4 AMR 501; *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor*; also on appeal to the Federal Court in [1992] 2 MLJ 241; and *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793.

**[23]** The defence conceded that the Malacca State Legislature has the power to enact ss 33 and 34 of the Enactment being a matter in the State List

but contended that *the pith and substance* of the Enactment deals *with matters relating to Islam* and so the only proper forum to try any offences under the Enactment shall be the Syariah court, so that the jurisdiction conferred on the magistrate's court clearly contravenes art 121(1A), seeking support in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119; *Soon Singh a/l Bihar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (PC); *Mohamed Habibullah*, and *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 (HC).

**[24]** I shall ascertain the merits or otherwise of the defence contention by examining title defence authorities.

**[25]** First, in *Mamat bin Daud* the petitioners were charged with an offemoe under s 298A of the Penal Code for doing an act which was likely to prejudice unity among persons professing the Islamic religion. The issue before the Supreme Court was whether s 298A as enacted by Parliament was ultra vires art 74(1). In other words, who should make this law — Parliament or the State Legislature? The issue relates to the legislative competence of either Parliament or the State Legislature. In a majority judgment, the then Supreme Court held that reading the section as a whole, it was a colourable legislation in that it pretends to be a legislation on public order when in pith and substance it is a law on the subject of the Islamic religion and so it was held that only the State Legislature has the power to legislate under arts 74 and 77.

**[26]** It is to be observed that the issue of the legislative competence of the Malacca State Legislature does not arise before me as the defence has conceded that the Enactment in general and ss 33 and 34 in particular have been enacted by the Malacca State Legislature with every legislative competence, and so there is no question of contravening arts 74 and 77, in which case the majority judgment of the then Supreme Court renders no assistance to the defence.

**[27]** Next, in *Soon Singh a/l Bikar Singh* where the appellant had filed an originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim after he has renounced Islam to which he had converted while he was a minor. Counsel for the Kedah Islamic Council raised a preliminary objection against the application, contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the Syariah courts. The decision of the learned High Court judge in upholding the objection was affirmed by the Federal Court as art 121(1A) had taken away the jurisdiction of the civil courts in respect of the matters within the jurisdiction of the Syariah courts.

**[28]** A strikingly similar situation arose in *Md Hakim Lee* where Abdul Kadir Sulaiman J (now JCA) held that the High Court had no jurisdiction, as the conversion to and renunciation of the Islamic faith came within the exclusive jurisdiction of the Syariah courts.

**[29]** It is clear to me that the identical issue in *Soon Singh* and *Md Hakim Lee* related to the conversion to and renunciation of the Islamic faith which are within the jurisdiction of the Syariah courts, in which case under art 121(1A), the civil courts have no jurisdiction.

**[30]** However, the subject matter before me is completely different, as it begs the question as to whether the offence relating to the non-registration of Islamic Religious Schools cornea within the exclusive jurisdiction of the Syariah court.

**[31]** In my view, the relevant statutory provisions which require my consideration are of ss 5, 33 and 34 of the Enactment and art 121(1) and (1A). These provisions, where relevant, merit reproduction as follows:

5 Registration of religious schools

(1) Subject to sub-s (2), no person or body of persons may establish or maintain a religious school unless the religious school is registered in accordance with the provisions of this Enactment.

(2) …

(3) Any person who contravenes sub-s (1) commits an offence and shall on conviction toe liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and in the case of a continuing offence, to a further fine not exceeding three hundred ringgit for each day or part of a day during which the offence continues after conviction.

33 Jurisdiction to try offences

The court of the first class magistrate shall have the jurisdiction to try all offences under this Enactment.

34 Imstitution of prosecution.

(1) No prosecution for or in relation to any offence under this Enactment shall be instituted except by or with the written consent of the Public Prosecutor (as amended vide Enactment No 8 of 2003).

(2) …

121 Judicial Power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak

(c) (Repealed)

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as toay be conferred by or under federal law.

A (1A) The courts referred to in cl (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

**[32]** In my view, s 5(1) prohibits eg the maintenance of a religious school except where the school has been registered pursuant to the provisions thereof, while s 5(3) provides for the punishment of a fine not exceeding B RM5,000 or imprisonment not exceeding three years or both, and a fine of RM300 per day or part thereof for the continuance of the offence after conviction pursuant to s 5(1).

**[33]** Section 33 expressly provides that a magistrate shall have jurisdiction C to try any offence under the Enactment. The vesting of this jurisdiction in the magistrate's court is consistent with federal law provided under s 85 of the Subordinate Courts Act 1948 which more specifically confers upon a magistrate the jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or with fine only, and offences under ss 392 and 457 of the Penal Code. D

**[34]** As the jurisdiction to try the offence as alleged in the charge herein has been expressly conferred upon a magistrate, it means that it is not a matter in which a Syariah court enjoys exclusive jurisdiction, and so there can be no contravention of art 121(1A) under which a civil court ceases to have E jurisdiction if and only if a particular matter comes within the jurisdiction of the Syariah court.

**[35]** In respect of criminal jurisdiction specifically, the Syariah courts shall only have jurisdiction in respect of offences in so far as conferred by federal law. In this context, the federal law is contained in the Syariah Courts F (Criminal Jurisdiction) Act 1965 which was enacted by Parliament vide Act 355 and enforced from 1 April 1965. More specifically s 2 thereof reads:

Criminal Jurisdiction of Syariah Courts

G 2 The Syariah Courts duly constituted wader any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:

H Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

**[36]** Under s 2, the criminal jurisdiction which Parliament has conferred I upon the Syariah courts is clearly circumscribed in the sense that it is confined to offences against the precepts of the religion of Islam by persons professing that religion which may be prescribed by any written law.

**[37]** That brings me to the consideration of the charge in question under s5(1) of the Enactment, in which no person or body of persons may establish or maintain a religious school (in this case, Tadika Pasti Al Khauthar) unless it is registered in accordance with the provisions of the Enactment. **A**

**[38]** In my judgment, the nature of the offence under s 5(1) does not belong to the category of offences against the precepts of the religion of Islam and so it is clearly not within the exclusive jurisdiction of the Syariah courts. **B**

**[39]** Support for my view may be found in the 'subject matter approach' expounded in the judgment of Haidar Mohd Noor CJ (Malaya) who spoke for the Federal Court in *The Islamic Council of Penang & Butterworth v Shaik Zolkaffily* by looking at the State Enactment to see whether or not the Syariah courts have been expressly conferred jurisdiction on a given subject matter. The Federal Court rejected the 'remedy prayed for' approach. **C**

**[40]** The 'pith and substance approach' adopted by the majority decision of the then Supreme Court in *Mamat bin Daud* is, in my view, analogous to the 'subject matter approach' herein. **D**

**[41]** Since the subject matter before me concerns the registration of an Islamic religious school and not the precepts of the religion of Islam,, there can be no doubt that the Malacca State Legislature has clearly intended to exclude the subject matter from the jurisdiction of the Syariah courts and instead conferred the jurisdiction on a magistrate. In other words, it is not a matter within the jurisdiction of the Syariah courts. **E**

**F**

**[42]** The expression 'jurisdiction of the Syariah courts' in art 121(1A) came up for judicial interpretation by the Court of Appeal in *Sukma Darmawan Sasmitaat Madja*. Gopal Sri Ram JCA who delivered the judgment of the court held that the expression refers to 'the exclusive jurisdiction of the Syariah courts'. The Court of Appeal added that if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS 45) and the Syariah Criminal Offences (Federal Territories) Act 1997 ('the 1997 Act'), then the courts referred to in art 121(1) viz High Court, sessions court or magistrate's court will have jurisdiction to try such an offence, and that it is only in respect of offences under the 1997 Act that a Syariah court may have exclusive jurisdiction. This interpretation has received the approval and affirmation of the Federal Court in [1999] 2 MLJ 241 through the judgment of Eusoff Chin CJ (Malaysia) (as he then was) at p 247 C–G. **G** **H**

**[43]** In the circumstances, I hold that ss 33 and 34 of the Enactment, when tested against art 121(1) and (1A), are valid and constitutional. **I**

**[44]** The answer to Question 2 is therefore also in the affirmative.

A VII SECTIONS 30 AND 84 OF THE COURTS OF JUDICATURE ACT 1964

**[45]** As the above questions were transmitted by the magistrate to me in the High Court under s 30(1) of the CJA 1964, and a decision on the questions is necessary for the determination of the proceedings in the magistrate's court, I have pursuant to s 30(2) of the Courts of Judicature Act 1964 dealt with this reference in accordance with s 84 of the same Act, as if it were a case before me in the original jurisdiction of the High Court and refer the above two questions to the Federal Court for a decision thereon by the Federal Court, by way of a special case stated under s 84(3) thereof.

*Order accordingly.*

Reported by Peter Ling